

MFA 130/2004

BEFORE

THE HON'BLE MR JUSTICE N. CHAUDHURY

JUDGMENT AND ORDER (Oral)

This is an appeal under Section 30 of the Workmen's Compensation Act, 1923 (Now renamed as 'Employee's Compensation Act, 1923' and herein after referred to as 'the Act') is directed against the judgment and award dated 22.07.2004 passed by the learned Workmen's Compensation Commissioner (for short, 'W.C. Commissioner'), Dhubri in W.C. Case No. 31 of 2000, thereby directing the Insurance Company to make payment of compensation to the tune of Rs.1,36,483/- to the workman along with interest @ 9% per annum with effect from 07.05.2000 till realization.

[2] Claimant Md. Saher Ali approached the learned W.C. Commissioner vide aforesaid W.C. Case stating that he worked as labourer in Truck No.AS-17/0407 owned by one Sri Joy Prakash Sarma of Gauripur. On 07.05.2000 when he was loading bricks in the same truck in Sona Brick Field at village Baladmara under Gauripur Police Station, he suffered injury by falling from the Truck. He was admitted to Dhubri Civil Hospital on 07.05.2000 and his treatment was prolonged thereafter. Because of the accident he suffered fracture in his pelvic girdle and has been rendered permanently disabled. He claimed to have lost his capacity to work as labourer. It is stated that Gauripur P.S. G.D Entry No.536, dated 14.05.2000 was recorded in respect to this accident and the matter was investigated into. Notice was served on the owner of the vehicle under Section 10 but he did not respond. The vehicle was covered under insurance policy of the opposite party No.2 who is the appellant herein. According to the claimant, he was entitled to compensation of Rs.3,00,000/-.

[3] Upon receipt of summons both the parties appeared and submitted written statement. While owner being opposite party No.1 admitted that the claimant was engaged by him as labourer but disclosed at the same time that the vehicle was covered by valid insurance under National Insurance Company Ltd. vide Policy No.200701/6301433. The Insurance Company impleaded as opposite party No.2 submitted written objection both on facts as well as on maintainability. The parties thereafter were asked to place their respective evidence. The claimant examined three witnesses, namely, himself as P.W.1, a co-worker as P.W.2 and a qualified medical practitioner (Dr. R. Sarma) as P.W.3. He also exhibited as many as twenty documents including X-ray report (Exhibit-13) and medical certificate (Exhibit-18). Although the witnesses were duly cross-examined by the opposite parties, the learned W.C. Commissioner noted the opinion given by doctor in Exhibit-14 Injury report. It was the evidence of the qualified medical practitioner that the claimant sustained permanent disability to the extent of 60%. However, no opinion appears to have been given by the qualified medical practitioner in regard to assessment as to loss of earning capacity of the victim workman. In course of argument before the learned W.C. Commissioner, the Insurance Company raised objection that the qualified medical practitioner is duty bound to give his assessment on loss of earning capacity but the learned Commissioner did not accept the contention and himself assessed the loss of earning capacity to the extent of 60%. The learned W.C. Commissioner also directed the Insurance Company to give interest @ 9% per annum with effect from 07.05.2000 i.e. date of accident which also appears to be in contravention of provision of Section 4A of the Act. This judgment and award delivered on 22.07.2004, therefore, has been brought under challenge by the Insurance Company before this Court by preferring this appeal.

[4] This Court on 24.11.2004 admitted the appeal but no substantial question of law was framed, through, required under Section 30 of the Act. Under such circumstances both the learned counsel for the parties argued that the same may be framed at this stage and appeal may be heard thereafter.

[5] I have heard Mr. A. Sharma, learned counsel for the appellant and Mr. A.R. Agarwala, learned counsel for the respondents/claimants. None has appear

ed on behalf of the owner of the vehicle.

[6] The claimant/ respondent No.1 has also filed a cross-objection in regard to assessment of loss of earning capacity and claimed that the workman has lost cent percent earning capacity because of the injury caused to his person permanently by the accident.

[7] I have perused the impugned judgment along with LCR. After hearing learned counsel for the appellant and after perusal of the records, the following substantial questions of law are framed:

(i) Whether the learned W.C. Commissioner committed error in assessing the loss of earning capacity himself in view of the specific provision under Section 4(1)(c)(ii)?

(ii) Whether the learned tribunal committed error in imposing interest @ 9% per annum with effect from date of accident in view of specific provision of Section 4A of the Employee's Compensation Act, 1923?

[8] The third witness examined by the claimant was Dr. Rabindra Sarma. He produced Exhibit-1 Discharge Certificate as well Exhibit-14 Injury report. He stated in course of his deposition that as per Exhibit-14 claimant was 38 years of age and suffered acetabular fracture of pelvic of right thigh. He also stated that there is dislocation of right hip of the workman. Because of injury there was a shortening of right lower limb by one inch and this disability is permanent in nature by 50%. In his examination-in-chief, he has not said a word for assessing the loss of earning capacity of the workman. On being cross-examined, he discloses that he is not an orthopedic doctor. He admitted that he did not refer the patient to a medical board for assessing extent of disability. However, he denied the suggestion that he is not authorised to issue disability certificate. He disclosed in course of his cross-examination that the medical certificate was issued on 09.08.2001 and the injury report was issued on 30.05.2000, the shortening of leg of the workman as deposed by him was not mentioned in the medical certificate (Exhibit-14). He denied the suggestion that Exhibit-18 was issued by him due to undue influence. It is conspicuous in the evidence of this witness that though he is a qualified medical practitioner yet he has not assessed the loss of earning capacity of the workman by considering the injury sustained by him vis-à-vis the occupation pursued by him. Section 4(1)(c)(ii) in this regard is clear and specific. It states that compensation payable to a workman in case of non-scheduled injuries is proportionate to the loss of earning capacity as assessed by the qualified medical practitioner permanently caused by the injury. The section being clear and unequivocal, it needs no interpretation. This section provides that the loss of earning capacity is to be assessed by the qualified medical practitioner. By conferring responsibility on the qualified medical practitioner to assess the loss of earning capacity of the victim, legislature has indicated that the learned W.C. Commissioner cannot usurp the jurisdiction unto itself and has to rely on the wisdom of the medical practitioner. Here in this case there is no evidence on record as to loss of earning capacity within the meaning of Section 4(1)(c)(ii) of the Act. The power and jurisdiction of the learned W.C. Commissioner in regard to assessment of loss of earning capacity has been disclosed by this Court earlier in the case of New India Insurance Company Ltd. Vs. Sanjit Kumar and Another reported in 2000 (2) GLT 567.

[9] Paragraph-2 of the above mentioned judgment is eloquent on the law regarding assessment of loss of earning capacity under Section 4(1)(c)(ii) and so the said paragraph is quoted below for ready reference.

2. I have heard Mr. S.K. Borkataki, learned counsel for appellant and Mr. G.P. Bhowmick, learned counsel for respondents. It is urged by Mr. Borkataki, learned counsel for the appellant as follows:

(i) That the mode of assessment of loss of earning capacity and the person competent to assess it have been provided in Section 4 of the Act. While judging the loss of earning capacity, the basis of sound principle of medical science and

d assessment done by a qualified medical practitioner plays a vital role, who is qualified medical practitioner has also been defined under the Act. The degree of disability and loss of earning capacity are not synonymous. There must be a basis of it, but not mere guess work and as such while doing assessment of the loss of earning capacity the qualified medical practitioner will have due regard to different injuries specified in Schedule-I. If the Commissioner does not keep in view the requirement of law and passes an award such an award involves substantial question for determination in an appeal and as such an appeal lies to this Court as contemplated under Section 30 of the W.C. Act.

(ii) In view of the specific requirement of the provisions of Section 4(1)(c) (ii) of the Workmen's Compensation Act, that the loss of earning capacity is to be assessed by a qualified medical practitioner it cannot be said to be a mere formality. The qualified medical practitioner also cannot assess the loss of earning capacity in his guess work but the nature of injuries, the percentage of physical disability, the capacity of the injured to perform the nature of work with specific reference to the type of work he is engaged in and several other such factors to come to a finding with regard to the loss of earning capacity. In that view of the matter, in absence of the evidence of the doctor in that regard it is not permissible for the Court to find out only from the evidence of physical disability to the extent of loss of earning capacity. The Commissioner, Workmen's Compensation in the present case at hand having assessed the loss, without any specific evidence of the doctor, as required under law, the award/judgment is not sustainable in law.

[10] Having so noticed, it is clear that in the absence of an assessment as to loss of earning capacity by a qualified medical practitioner, the learned W.C. Commissioner committed jurisdictional error in making the assessment himself and that too at 60% without there being any material whatsoever on record. Such a finding of the learned W.C. Commissioner is perverse and accordingly, the first substantial question of law is decided in favour of the appellant and against the claimant.

[11] Coming to the second substantial question of law, it is to be noted that Section 4A of the Act was inserted in the statute book by amendment Act 8 of 1959 and the same came into force with effect from 01.06.1959. This is the provision for compensation payable to a workman due to default by the employer in making payment of compensation in time. It provides that the payment shall be deposited with the Commissioner or to the employee directly as the case may be without prejudice to the right of the employee to make any further claim. In Clause-(3) where any employer is in default in paying the compensation due under the Act within one month after it had fallen due, the commissioner has to direct that employer shall, in addition to the amount of arrears, pay simple interest thereon @ 12% per annum or at such higher rate not exceeding the maximum of the lending rates of any scheduled bank as may be specified by the Central Government, by notification in the Official Gazette, on the amount due. The Section further provides if there is no justification for the delay, the commissioner shall direct that the employer shall, in addition to the amount of the arrears and interest thereon, pay a further sum not exceeding 50% of such amount by way of penalty. However, no penalty can be imposed without affording an opportunity of hearing to the owner. It is noticeable that under Section 4A(3) the question of paying interest arises only if the amount has not been paid within a period of 30 days from the date of its falling due. There is no doubt that the payment of compensation falls due as soon as the award is passed by the learned W.C. Commissioner and so it is the date of passing the award. The learned W.C. Commissioner, therefore, cannot pass an award directing to pay penalty for default before expiry of 30 days from the date of passing of the judgment. However, in some of the decisions given by the Hon'ble Supreme Court without taking recourse to Section 4A of the Act, the inherent power of the learned W.C. Commissioner to direct payment of interest @ 7 % from the date of accident up to date of award has been recognized but in no case Section 4A would become applicable before the 30 days time

me is expired from the date of passing of the award.

[12] Considering the totality of circumstances and having noticed that the learned W.C. Commissioner has directed the Insurance Company to make payment @ 9% per annum from the date of accident, it cannot be accepted in view of the aforesaid discussion. The second substantial question of law, therefore, stands answered in favour of the appellant and against the claimant.

[13] Both the substantial question of law, thus, having been decided in favour of the appellant, the appeal stands allowed and the impugned judgment an award referred to above stands set aside. At this stage, Mr. A.R. Agarwala, learned counsel for the respondent/claimant submits that after admission of the appeal, Insurance Company deposited Rs.50,000/- only as against the total amount of the compensation and the same amount has been withdrawn by the workman already. It is thus noticeable that the Insurance Company has failed to make payment of the assessed amount within the prescribed period under Section 4A of the Act. The learned W.C. Commissioner shall afford opportunities to the parties to lead further evidence to prove the loss of earning capacity in accordance with law and thereafter, shall pass the award afresh by giving adequate opportunity of hearing to the parties in view of the fact and circumstances referred to above. Since this is an appeal of 2004, the learned W.C. Commissioner, Dhubri shall decide the matter as expeditiously as possible preferably within 3 (three) months from the date of receipt of records. The parties shall appear before the learned W.C. Commissioner on 13.07.2015 to obtain necessary instructions. In the meantime, the Registry shall positively transmit the records to the Court of learned W.C. Commissioner, Dhubri.

[14] No order as to costs.